

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JONTHON SAEZ, <i>pro se</i> ,	:	SUMMARY ORDER
	:	10-CV-4358 (DLI)
Plaintiff,	:	
	:	
-against-	:	
	:	
ANDREW CUOMO, Attorney General of the State of New York, ¹	:	
	:	
Defendant.	:	

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DORA L. IRIZARRY, U.S. District Judge:

Pro se plaintiff Jonthan Saez, currently incarcerated at Otis Bantum Correctional Center, filed this action on October 8, 2010. Plaintiff's request to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a) is granted. However, for the reasons discussed below, the complaint is dismissed without prejudice. Plaintiff is granted thirty (30) days from the date of this Order, i.e., until May 16, 2011, to file an amended complaint. No summons shall issue at this time and all further proceedings shall be stayed for thirty (30) days. Should plaintiff fail to replead in a timely manner, and/or the amended complaint fails to correct the deficiencies noted in this Order or otherwise fails to satisfy pleading or jurisdictional requirements, the complaint will be dismissed *with prejudice*.

DISCUSSION

Under 28 U.S.C. § 1915A, a district court "shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or employee of a governmental entity." 28

¹ Plaintiff is advised that Andrew Cuomo is now the Governor of New York. Eric T. Schneiderman became New York Attorney General on January 1, 2011.

U.S.C. § 1915A. Upon review, a district court shall dismiss a prisoner complaint *sua sponte* if the complaint is “frivolous, malicious, or fails to state a claim upon which relief may be granted; or seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b).

Pursuant to Rule 8 of the Federal Rules of Civil Procedure, a complaint must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim will be considered “plausible on its face” “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). In reviewing plaintiff’s complaint, the court is mindful that, “a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

In his complaint, plaintiff alleges that several sections of the New York Penal Law somehow violate the supremacy Clause of the U.S. Constitution because they were never certified as constitutional by the “N.Y.S. supreme court” (Compl. at 2.) However, the complaint contains no facts, allegations, or legal theories to support such a claim, making it impossible for the defendant to meaningfully respond to it. Accordingly, the complaint is dismissed without prejudice.

CONCLUSION

In light of plaintiff’s *pro se* status, plaintiff is granted thirty (30) days from the date of this Order, *i.e.*, until May 16, 2011, to file an amended complaint. The amended complaint must be captioned as an “Amended Complaint,” name all defendants in the caption, and bear the same docket number as this Order. The amended complaint must also comply with Rule 8(a) of the

Federal Rules of Civil Procedure. Plaintiff must name as proper defendants those individuals who have some personal involvement in the actions he alleges in the amended complaint and provide the dates and locations for each relevant event. If plaintiff does not know the names of the individuals, he may identify each of them as John Doe or Jane Doe. To the best of his ability, plaintiff must also set forth a legal basis to support his claims. Plaintiff is further directed to state if he has a pending state court criminal action, and the current status of those proceedings.

No summons shall issue at this time and all further proceedings shall be stayed for thirty (30) days. If plaintiff fails to amend his complaint by May 16, 2011, and/or the amended complaint fails to correct the deficiencies noted in this Order or otherwise fails to satisfy pleading or jurisdictional requirements, the complaint will be dismissed *with prejudice*. For the convenience of plaintiff, and in light of his *pro se* status, instructions on how to amend a complaint are attached to this Order. The court certifies pursuant to 28 U.S.C. § 1915 (a)(3) that any appeal from this Order would not be taken in good faith and, therefore, *in forma pauperis* status is denied for purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: Brooklyn, New York
April 15, 2011

/s/
DORA L. IRIZARRY
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK
PRO SE OFFICE
U.S. COURTHOUSE
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

HOW TO AMEND YOUR COMPLAINT

If you have forgotten to state an important matter in your complaint, you discover something new after you filed your complaint, you want to add a defendant, or you want to insert the true name of a "John Doe" defendant, you may be able to file an amended complaint. An amended complaint does not just add to the first complaint. Once you file an amended complaint it entirely replaces your original complaint.

Amendments to a complaint are governed by Rule 15(a) of the Federal Rules of Civil Procedure. Rule 15(a) provides that:

A party may amend the party's pleading **once** as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

This means that if the defendant has not yet filed an answer to your complaint, you can file one amended complaint without permission of the Court. If the defendant has filed a motion to dismiss but has not filed an answer, you are still entitled to file one amended complaint without permission. (You are only permitted to file **one** amended complaint before defendant files an answer; if you wish to file a second amended complaint before defendant files an answer, you must obtain defendant's consent or you must obtain permission from the Court). However, if the defendant has already filed his answer to your complaint, you must get written consent from the defendant or permission of the Court before amending your complaint. If the defendant agrees in writing that you can file an amended complaint, you must ask the judge to write "So Ordered" on the written consent, indicating that the judge has approved the consent. If the defendant does not give you written consent, you can ask permission from the Court by filing a motion to amend the complaint and including a copy of the proposed amended complaint with your motion papers. Instructions for preparing a motion are attached and are available separately.

If you file an amended complaint. It **must** be captioned as an "Amended Complaint."

FILING AND SERVING THE AMENDED COMPLAINT

SERVICE OF THE AMENDED COMPLAINT BEFORE THE ORIGINAL COMPLAINT HAS BEEN SERVED

If you decide to amend your complaint before defendant has been served with your original complaint and summons, you should serve the amended complaint on defendant and file the original amended complaint with the Pro Se Office as follows:

1. Make copies of your amended complaint.
2. Keep one copy for your own records.
3. File the original of your amended complaint with the Pro Se Office.
4. If you have not added new defendants in your amended complaint, use the summons that was originally issued by the Court.
5. Have a copy of the summons and a copy of the amended complaint served on each defendant by someone who is over eighteen and is not a party to the action. The original summons with the seal of the court embossed on it must be returned to the Court, so do not serve the original summons on any defendant.
6. Have the person who serves the summons and amended complaint on each defendant complete an affidavit or affirmation of service of process form.
7. Make a copy of the affidavit or affirmation of service of process and keep it for your own records.
8. Attach the original affidavit or affirmation of service to the original summons.
9. File the original summons and the affidavit or affirmation of service of process with the Pro Se Office.

SERVICE OF THE AMENDED COMPLAINT AFTER THE ORIGINAL COMPLAINT HAS BEEN SERVED ON ALL DEFENDANTS

If you decide to amend your complaint after the defendant has been properly served with your original complaint and summons (and you have not added any new defendants in your amended complaint), you should take the following steps:

1. Make copies of your amended complaint.

2. Keep one copy for your own records.
3. Send a copy of your amended complaint to the attorney for each defendant by ordinary first-class mail.
4. Complete an affidavit or affirmation of service of process form stating that the amended complaint was mailed to each defendant.
5. Make a copy of the affidavit or affirmation of service of process and keep it for your own records.
6. File the original amended complaint and your original affidavit or affirmation of service of process with the Pro Se Office.

DELIVERY OF THE AMENDED COMPLAINT AFTER THE ORIGINAL COMPLAINT HAS BEEN SERVED ON SOME DEFENDANTS BUT NOT ON OTHERS

If you decide to amend your complaint after some defendants have been served with your original complaint and summons but before other defendants have been served (or you have added new defendants in your amended complaint), you should take the following steps:

1. Make copies of your amended complaint.
2. Keep one copy for your own records.
3. Send a copy of your amended complaint by ordinary first-class mail to each defendant who has already been served.
4. Complete an affidavit or affirmation of service of process form stating that the amended complaint and summons was mailed to each defendant.
5. Make a copy of the affidavit or affirmation of service of process and keep it for your own records.
6. File the original amended complaint and original affidavit or affirmation of service of process with the Pro Se Office.
7. If you have not added new defendants in your amended complaint, you must serve the amended complaint on the defendant who has not yet been properly served. If you have added new defendants, the Court will issue an amended summons which must be served with the amended complaint. If you are adding defendants, you must bring this to the attention of the Pro Se Writ Clerk.

8. Have a copy of the amended summons and a copy of the amended complaint served pursuant to Rule 4 of the Federal Rules on any defendant who was not previously served with the original complaint.
9. Have the person who served the amended summons and the amended complaint to each of the new defendants complete an affidavit or affirmation of service of process form.
10. Make a copy of the affidavit or affirmation of service of process.
11. Attach the affidavit or affirmation of service of process to the amended summons.
12. File the original amended summons and the original affidavit or affirmation of service of process with the Pro Se Office.

If you have questions regarding any of the procedures listed above, please contact the Pro Se Office at 718-613-2665.

**Tara D. Hunter-Hicks
and
Ralph Vega, Jr.
Pro Se Writ Clerks**

**Attn: Pro Se Office
United States District Court
for the Eastern District of New
York
225 Cadman Plaza East
Brooklyn, NY 11201**

8:30AM - 5:00PM

(718) 613-2665